IN THE

Supreme Court of the United States

October Term, 1960.
No. 67.

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. 2281 ET SEQ.

Appellants' Brief

THEODORE R. MANN,
MARVIN GARFINKEL,
STEPHEN B. NARIN,
1301 Packard Building,
Phila. 2, Pa.,
Attorneys for Appellants.

NARIN, GARFINKEL and MANN,
Of Counsel.

Martin & Lyle, 1025 Bankers Securities Bldg., Phila. 7, Pa.

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Thornhill v. Alabama, 310 U. S. 88 (1940) ..... 8, 19, 2[illegible]
Two Guys From Harrison-Allentown, Inc. v. McGinley, 179 F. Supp. 944 (E. D. Pa. 1959) 1, 7, 39, 41

United States v. Carolene Products Co., 304 U. S. 144 (1938) ..... 8, 2[illegible]

West Virginia State Board of Education, et al. v. Barnette, et al., 319 U. S. 624 (1943) 9, 17, 19, 31

Zorach v. Clauson, 342 U. S. 313 (1952) 16

TABLE OF STATUTES CITED

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Conn. Gen. Stat., §8609 (1949)	25
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Wis. Stat., §351.52 25

MISCELLANEOUS TEXTS

(In order of citation)

The Holy Scriptures (Jewish Publ. Soc. of Amer., 1917) 1

Encyc. Brit., Vol. 19, Sabbath (1950) 11, 12, 1

George Foot Moore, Judaism in the First Centuries of the Christian Era (Harv. Univ. Pr., 1954) 1

The Babylonian Talmud, Seder Mo'ed, Shabbath, Vol. 1, Foreword by Dr. J. H. Hertz; Introduction by I. Epstein (Soncino Press, 1938) 1

Gaster, Festivals of the Jewish Year, (Sloane, N. Y., 1952) 1

Segal, The Sabbath Book, (Thomas Yoseloff, 1957) ... 1

Josephus, Antiquities of the Jews, Book xiv, Ch. x (J. Griggs, Phila., 1829) 1

The Pentateuch and Haftorahs (Soncino Press, 1952) .. 1

The Authorized Daily Prayer Book (Rev. Ed.), (Bloch Publ. Co., 1948) 12, 1

Jewish Encyc., Vol. 10, Sabbath, (Funk & Wagnalls Co., 1905) 1

Heschel, The Sabbath, (Farrar, Strause & Young, Inc., 1951) 1

Grayzel, A History of the Jews (Jewish Publ. Soc., 1956) 1

Silver, Where Judaism Differed (Jewish Publ. Soc., 1957) 1

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Encyc. Brit., Vol. 21, Sunday (1950) 14, 18

The Babylonian Talmud, Seder Mo'ed, Rosh Hashanah 15

Universal Jewish Encyc., Vol. 6 (N. Y., 1948) 17

Mead, Handbook of Denominations (Abingdon Pr., 1956) 17

Cross, The Oxford Dictionary of the Christian Church (Oxford Univ. Pr., 1957) 18

Johnson & Yost, Separation of Church and State in the United States (Univ. of Minn. Pr., 1948) 18

World Almanac (N. Y. World-Tel. and The Sun, 1960) 21

Writings of James Madison, Vol. 3 (J. B. Lippincott & Co., 1865) 25

Kallen, Cultural Pluralism and the American Idea (Univ. of Pa. Pr., 1956) 29

Kallen, Culture and Democracy in the United States: Studies in the Group Psychology of the American Peoples (Boni & Liveright, 1924) 30

Handlin, The American People in the Twentieth Century (Harv. Univ. Pr., 1954) 30

Kaplan, The Eternal Stranger. A Sociological Study of Jewish Life in the Small Community (Bookman, 1957) 30

Cappon, The Adams-Jefferson Letters (Chapel Hill, 1959) 40

I.

OPINIONS DELIVERED IN COURT BELOW.

No opinion was written by the three-judge District Court which dismissed appellants' Amended Complaint. The Final Order (R. 18, 19) cites as authority the opinion in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959); Jurisdictional Statement, Appendix B, p. 18 et seq.

II.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

The jurisdiction of this Court is invoked under 28 U. S. C. §1253 and 2281 *et seq.*, the appeal being from a Final Order (entered on December 16, 1959) of a three-judge District Court which refused a permanent injunction, sought by appellants on the ground that the state statute hereinafter referred to conflicted with the United States Constitution, and dismissed their Complaint. *Query v. United States*, 316 U. S. 486, 490-91 (1942).

The Notice of Appeal to this Court (R. 19, 20, 21) was filed on February 11, 1960, in the United States District Court for the Eastern District of Pennsylvania. A Jurisdictional Statement was filed, and probable jurisdiction was noted on May 23, 1960.

III.

STATUTES INVOLVED.

This litigation involves the validity of the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, 18 Purd. Pa. Stat. Ann. §4699.10 (supp.), which provides:

> "Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> "Each separate sale or offer to sell shall constitute a separate offense . . ."

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, including the Equal Protection and Due Process clauses of the latter Amendment. The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

QUESTIONS PRESENTED.

1. Whether the enforcement of the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, against retailers whose religion forbids them from engaging in work and commercial activity, personally or through others, on Friday evening and Saturday, and who are in competition with other retailers who operate their businesses on Friday evening and Saturday, *interferes with their free exercise of religion, and hinders Orthodox Judaism in its ability to compete for adherents with other sects*, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, where the loss of business resulting from such enforcement will put such retailers to the choice of either giving up their faith, or

(a) substantially reducing their ability to earn a livelihood (in the case of four of the appellants), or

(b) going out of business and losing a substantial

capital investment (in the case of one of the appellants).

2. Whether the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, and the enforcement thereof, violate the proscription against an establishment of religion in the due process clause of the Fourteenth Amendment to the United States Constitution by preferring certain religious sects and by protecting certain religious sects without offering the same protection to other religious sects.

3. Whether the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, is arbitrarily selective in the commodities and businesses affected in violation of the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution.

V.

STATEMENT OF THE CASE.

Appellants, plaintiffs below, instituted a suit seeking a permanent injunction restraining the enforcement of the Pennsylvania Act of August 10, 1959, P. L. 660, 18 Purd. Pa. Stat. Ann. §4699.10 (supp.), hereinbefore set forth.

The court below was convened pursuant to section 2281 *et seq.* of Title 28, U. S. C. A Motion to Dismiss was filed and a Consent Decree, temporarily restraining enforcement of the Act, was entered. On December 7, 1959 the Complaint was dismissed and the Temporary Restraining Order was dissolved. On December 10, 1959 permission to file an Amended Complaint was granted, and such a Complaint was thereafter filed by appellants.

Their Amended Complaint (R. 12-16) alleged in part that:

"* * *

"5. Each of the aforesaid plaintiffs is the owner and operator of a store within the City of Philadelphia which sells at retail certain goods, specifically: Abraham Braunfeld owns and operates a retail store at 327 South Street at which he sells clothing and wearing apparel for children; plaintiff Isaac Friedman owns and operates a retail store at 759 South 4th Street at which he sells home furnishings, to wit, draperies and slip-covers; Alter Diament owns and operates a retail store at 763 South 4th Street at which he sells home furnishings, to wit, draperies and slipcovers; S. David Friedman and Joseph R. Friedman own and operate a retail store at 2247 E. Williams Street at which they sell wearing apparel, to wit, shoes.

"* * *

"8. Each of the plaintiffs herein is an observant and Orthodox member and adherent of the Jewish faith. The laws of said faith, particularly the Fourth Commandment of the Decalogue, require a total abstention from business and all manner of work from nightfall Friday until nightfall Saturday each week, this period constituting the Sabbath of the Jewish religion; and forbid its adherents to hire other employees regardless of the faith of such employees, to work during this same period.

"9. The foregoing religious requirement of Sabbath observance occupies a central and primary position in the scheme of religious observances of Orthodox Judaism, and one who does not observe the Sabbath in the manner set forth cannot be an Orthodox Jew.

"10. Each of the plaintiffs herein always has abstained, and at the present time continues to abstain from business and all manner of work on the said Jewish Sabbath and keeps his store regularly closed during that period.

"* * *

"12. The plaintiffs have heretofore kept their places of business open on Sunday. If they continue to do so, they will subject themselves to prosecution under the said statute, unless such prosecution is enjoined by this Court and the statute is declared unconstitutional.

"13. In the general business area in which the plaintiffs do business, the night and day which the plaintiffs voluntarily stay closed because of their religious convictions, to wit, Friday night and Saturday, are the night and day of the week on which the greatest volume of business is done by plaintiffs' competitors.

"14. The volume of business which each of the plaintiffs does on Sunday is substantially less than the volume of business which each of the plaintiffs would do if he stayed open on Saturday or on Friday night and Saturday.

"15. Each of the plaintiffs does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays.

"16. Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment."

Plaintiffs averred (R. 15, 16) that the Act violated the United States Constitution in the particulars set forth hereinbefore (see Questions Presented).

Appellees, defendants below, moved to dismiss the Amended Complaint (R. 18) on the grounds that (a) no substantial federal question was presented; (b) no claim was stated against defendants upon which relief could be granted; and (c) the Act was constitutional on its face.

On December 16, 1959, the three-judge statutory District Court below dismissed the Amended Complaint, and held that the instant case came within the legal ruling in *Two*

Guys from Harrison-Allentown, Inc. v. McGinley, 179 F. Supp. 944 (E. D. Pa. 1959), decided on December 1, 1959 by another statutory court of the same district (R. 18, 19).

VI.

SUMMARY OF ARGUMENT.

Appellants are Orthodox Jews. They observe strictly the injunction against Sabbath labor set forth in the Fourth Commandment of the Decalogue, and this observance is essential to their continued existence as Orthodox Jews, and for the survival of Orthodox Judaism **(pp. 10-14)**.

Even if the Pennsylvania Act be viewed as purely secular legislation, its enforcement will nonetheless restrict appellants' religious freedom. They are retailers who have been able to support themselves and their families modestly, even though their religion compels them to stop operations on what have become in our society the best shopping evening and shopping day—Friday evening and Saturday. Enforcement of the statute will require them either to operate on a four and one-half day week—the least remunerative four and one-half business days of the week—or to give up their faith. At least one of them will not be able to survive in business if the statute is enforced against him (R. 15), and if he continues to observe the Sabbath. Thus, enforcement of the statute becomes an instrument of economic compulsion to abandon religious faith **(pp. 14-18)**.

Further, enforcement of the statute will severely handicap Orthodox Judaism in its ability to compete fairly for adherents with other religions and sects **(p. 16)**.

The statute is not attended by the usual presumption of constitutionality. Because its enforcement is an instrument

tending to compel religious abandonment, it must be judged by the "clear and present danger" standard. *Thornhill v. Alabama*, 310 U. S. 88 (1940). Furthermore, because it restricts the liberty of a small, discrete religious minority, unable to protect its interests through the normal political processes, it must receive especially exacting judicial scrutiny. *United States v. Carolene Products Co.*, 304 U. S. 144, 152, note 4 (1938); *Minersville School District v. Gobitis*, 310 U. S. 586, 605, 606 (1940) (Justice Stone, dissenting) **(pp. 18-22)**.

The legislation cannot be justified by the need for rest. There are many alternative ways of assuring rest that do not entail restrictions on religious liberty. Pennsylvania has in the past enacted true "day of rest" statutes, requiring certain persons to rest one day or one and a half days in every seven. The need for rest cannot be equated with a need for a uniform day of rest **(pp. 22-24)**.

The rationale that the entire community should be at rest on the same day so that competition and economic warfare can stop cannot justify such legislation. Sunday operations by such a small number of persons do not present our society with the kind of "clear and present danger" which this Court has required in the past to sustain legislation affecting religious freedom. Indeed, it is this very lack of danger to society which accounts for the fact that Sabbatarian groups have been exempted from closing laws in many states. The dangers of polygamy, or refusal to permit immunization against disease, or child labor—dangers which have justified restrictions on religious liberty—are strikingly absent in the case at bar **(pp. 24-29)**.

Furthermore, the desire for an entire community at rest on the same day is at war with the ideals and aspirations of a culturally diverse people. It is certainly not such a socially desirable result that it may constitutionally be achieved at the expense of cultural plurality. Sunday business has developed among Sabbatarians as a cultural manifestation of their efforts to support their families without sacrificing sacred beliefs **(pp. 29, 30)**.

In other contexts, this Court has struck down legislation the primary purpose of which was to unify or standardize the people. Thus, requiring all children to go to public schools, *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), and outlawing the teaching of foreign languages to young children, *Meyer v. Nebraska*, 262 U. S. 390 (1923), have been declared unconstitutional. Even "national unity" as the basis of "national security" has been outlawed where the means for obtaining national unity have been statutory compulsion. *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U. S. 624 (1943) **(pp. 30-32)**.

B. The Pennsylvania Act under consideration protects and prefers Christianity and, therefore, violates the proscription against the establishment of religion contained in the First and Fourteenth Amendments. The Act is but one in an entire complex of blue law legislation in the Commonwealth of Pennsylvania and must be viewed as such. The underlying law is on its face Christian legislation and in every Pennsylvania decision for the past century has been so regarded. The fact that the instant statute was drafted in purely secular terms cannot change its character. Careful phraseology does not camouflage the fact that all the latter day rationalizations for blue law legislation—the need for rest, for uniformity of enforcement, for community repose—have been conceived to save legislation, the real and obvious and heretofore admitted purpose for which is the protection and preference of Christianity.

This Court has said:

> "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion'. * * * If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'" *McCollum v. Board of Education*, 333 U. S. 203, 232 (1948).

This legislation resulted from a Church-State combination proscribed by the First Amendment **(pp. 32-40)**.

VII.

ARGUMENT.

A. Enforcement of the Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, §1 against the Orthodox Jewish appellants interferes with their free exercise of religion and hinders Orthodox Judaism in its ability to compete for adherents with other sects, in violation of the First and the Due Process Clause of the Fourteenth Amendments to the United States Constitution.

1. *Strict Sabbath observance is at the core of, and is inseparable from, Orthodox Judaism.*

The argument in the next succeeding section of this brief is that enforcement of the Pennsylvania Amendatory Act will tend to compel Orthodox Jews to abandon Sabbath observance, which to them is the equivalent of abandoning their faith. To reach that point, appellants' counsel must first establish the cardinal importance of the Sabbath institution to Orthodox Judaism, but do not wish to lengthen unduly this brief with an essentially non-legal exposition. A few brief remarks concerning that subject will, therefore, be set forth in the text of the brief, with supporting data appearing in the footnotes.

The scriptural source of the Sabbath institution is Exodus 20:8-11, setting forth the Fourth Commandment as follows:

> "Remember the sabbath, to keep it holy. Six days shalt thou labor, and do all thy work; but the seventh day is a sabbath unto the Lord thy God, in it thou shalt not do any manner of work, thou, nor thy son,

nor thy daughter, nor thy man-servant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates; for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested on the seventh day; wherefore the Lord blessed the sabbath day, and hallowed it" [THE HOLY SCRIPTURES (The Jewish Publication Society of America, 1917)].

Another version of the same Commandment is found in Deut. 5:12-15. The underlying principles regarding working on the Sabbath will be found in Gen. 2:1-3; Exod. 16:22-30; Exod. 31:12-17; Exod. 21:13-17; Exod. 34:21; see also, Isa. 58:13, 14; Amos 8:4-6; Jerem. 17:21, 22.

To the Orthodox Jew, the Fourth Commandment was revealed by God to Moses at Mount Sinai. To all, the great antiquity of the Sabbath idea is beyond dispute.[1]

From the days of the Decalogue at least, the Sabbath has been of enormous and undiminished importance to Judaism.[2] Traditional Jews have by their actions—even by giving up their lives[3]—demonstrated their belief that they "must

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[1] Authorities differ as to the age of the Sabbath idea, some believing it was sponsored by Moses, and others that it does not predate the Babylonian exile (596 B. C.). See **Encyc. Brit.**, Vol. 19, **Sabbath**, pp. 787-789 (1950).

[2] For brief, authoritative exposition on the cardinal importance of the Sabbath in Jewish life, past and present, the Court is referred to **George Foot Moore, Judaism in the First Centuries of the Christian Era**, Vol. 2, pp. 21-39 (Harv. Univ. Press, 1954); **The Babylonian Talmud, Seder Mo'ed, Shabbath**, Vol. 1, Foreword by Dr. J. H. Hertz, xiii-xv; Introduction by I. Epstein, xxi-xxvi (The Soncino Press, 1938); **Gaster, Festivals of the Jewish Year**, pp. 263-290 (Sloane, N. Y. 1952). Encyclopedia Britannica notes (Id., p. 787) that the Fourth Commandment follows immediately upon the commandments which are concerned with God's name indicating, in the words of the contributor, ". . . how great must have been the importance of the Sabbath . . . The emphasis on the Sabbath in this form of the Decalogue is the more noteworthy in view of the fact that it ignores all the other feasts and rites."

[3] Antiochus Epiphanes sought to abolish the Sabbath, and the Jews at the beginning of the Maccabean revolt allowed themselves to be massacred in cold blood rather than profane the Sabbath—even in self-defense (**Moore, op. cit., supra**, note 2, at 26). Afterwards, the leaders

observe the Sabbath throughout their generations, for a perpetual covenant" (Exod. 31:16).

One of the great Jewish scholars of recent times has said that, "Without the observance of the Sabbath, of the olden Sabbath, of the Sabbath as perfected by the Rabbis, the whole of Jewish life would in time disappear."[4] The material collected in the notes below points up the generally accepted belief among traditional Jews for the past several millenia that the survival of Judaism is inextricably bound up with the continued virility of the Sabbath institution.[5] These age-old and modern authorities form the basis for the appellants' averment that "The . . . religious requirement of Sabbath observance occupies a central and primary position in the scheme of religious observances of Orthodox Judaism, and one who does not observe the Sabbath in the manner set forth cannot be an Orthodox Jew" (R. 14).

The Sabbath and its relationship to the destiny of Israel have been steeped in mystical concepts of a religious nature

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in Israel decided to recognize defensive warfare as permissible on the Sabbath. (**Segal, The Sabbath Book,** pp. 108, 206, 207, Thomas Yoseloff, 1957). And at a later date the tenacity of the Jews' grip on the Sabbath compelled the Romans to exempt them from military service [**Encyc. Brit.,** Vol. 19, **Sabbath,** pp. 787-789 (1950); **Josephus Antiquities of the Jews,** Book xiv, Ch. x, §§11-19 (J. Grigg, Phila. 1829).

[4] Dr. J. H. Hertz, the late Chief Rabbi of England, in his commentaries to **The Pentateuch and Haftorahs** p. 298 (Soncino Press, 1952).

[5] Achad Ha'am, 19th century Jewish writer: "Far more than Israel has kept the Sabbath, it is the Sabbath that has kept Israel." Quoted by Dr. Hertz in his commentaries to **The Authorized Daily Prayer Book (Rev. ed.),** p. 341 (Bloch Publ. Co., 1948).

Maimonides: "The institution of the Sabbath and the prohibition against idolatry are each equal in importance to all the other laws of the Torah. . . . The Sabbath is also a sign between the Holy One, blessed be He! and us forever." **Jewish Encyc.,** Vol. 10, **Sabbath,** p. 598 (Funk & Wagnalls Co., 1905).

Abraham Joshua Heschel, modern Jewish scholar: "There are few ideas in the world of thought which contain so much spiritual power as the idea of the Sabbath. Aeons hence, when of many of our cherished theories only shreds will remain, that cosmic tapestry will continue to shine. Eternity utters a day." **Heschel, The Sabbath,** p. 101 (c. 1951).

And see authorities cited in note 2.

from the earliest times until today.[6] It has been and is, despite its many restrictions, a day of great joy, lifting the Jew out of his environment, which in some times and places has been hostile in the extreme, and transforming him from his frequently degraded condition to princely state for a fleeting day.[7]

The footnoted material will make clear, too, that there is no real relationship between the Jews' Sabbath and the Christians' Sunday. While the latter arose out of the former, they are not the same either in conception or in manner of observance. "Paul from the first days of Gentile Christianity, laid it down definitely that the Jewish Sab-

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[6] For example, in Jewish legend the Sabbath is Israel's bride, and in the sixteenth century in Safed, Palestine, the Jews in the community would dress in white on Friday evening and walk **en masse** to the outskirts of the city, to welcome her. **Grayzel, A History of the Jews,** p. 471 (Jewish Publ. Soc., 1956). To this day, every Jew who worships on Friday evening repeats over and over again the words, "Come, my friend, to meet the bride. Let us welcome the presence of the Sabbath." **The Authorized Daily Prayer Book (Rev. ed.),** pp. 356-359 (Bloch Publ. Co., 1948).

[7] Dr. Hertz, in his Foreword to the Shabbath tractate of the Babylonian Talmud, **op. cit., supra,** note 2, at p. xv, quotes German Protestant theologian R. Kittel as follows:

> "Anyone who has had the opportunity of knowing in our own day the inner life of Jewish families that observe the Law of the fathers with sincere piety and in all strictness, will have been astonished at the wealth of joyfulness, gratitude and sunshine, undreamt of by the outsider, with which the Law animates the Jewish home. The whole household rejoices on the Sabbath, which they celebrate with rare satisfaction not only as the day of rest, but rather as the day of rejoicing. Jewish prayers term the Sabbath a 'joy of the soul' to him who hallows it: he 'enjoys the abundance of Thy goodness.' Such expressions are not mere words; they are the outcome of pure and genuine happiness and enthusiasm."

On the Sabbath the Jew worships and rejoices, is instructed, teaches his children, blesses his children, praises his wife with the beautiful eulogy of the model housewife from **Proverbs** 31:10-31. See **Moore, op. cit., supra,** note 2, at pp. 34-39.

See poem "Princess Sabbath" by Heinrich Heine; **Silver, Where Judaism Differed,** p. 92 (Jewish Publ. Soc., 1957).

bath was not binding on Christians."[8] Sunday became the Lord's Day in Christianity, a day set apart for worship in memory of the Resurrection.[9]

2. *Enforcement of the Act will tend to compel abandonment of Sabbath observance and, consequently, Orthodox Judaism by appellants and those similarly situated.*

The special vice of the statute now before the Court is the choice it puts to the Sabbatarian businessman: To give up his Sabbath observance and thus his faith or to go out of business or, at least, suffer serious economic loss. And it is the statute, not appellants' religion, which is the cause of this dilemma; for until now appellants and those of similar religious persuasion have been able to keep their faith *and* survive in the business world, despite the coincidence that their evening and day of rest and our society's best shopping evening and day are the same. There may be increasing pressures toward social conformity, but our still complex, culturally pluralistic people have always been able to accommodate the persevering Sabbatarian. *It is statutory compulsion—the power of government*—that makes the difference. Sunday—in any event, not comparable to Saturday as a business day—has until now offered appellants an opportunity to make up for part of the enormous business loss strict Sabbath observance entails. But the Pennsylvania Act denies them this opportunity, and they are left with not a single hour of week-end time within which to conduct business. It is a fact that the Sabbath observer whose trade brings him within the proscription of the Pennsylvania Act is able to conduct his retail business only from Monday morning until mid-

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[8] **Encyc. Brit.**, Vol. 19, **Sabbath**, pp. 787-789 (1950).

[9] Id., Vol. 21, **Sunday**, p. 565.

afternoon on Friday.[10] And a retail businessman cannot realistically be expected to operate profitably on a four and one-half day week, when the other two and one-half days happen to be the entire week-end. Appellants do not go to their customers. They must wait for customers to come to them. And to customers in our society, week-ends have become prime shopping time.

The competitive disadvantage to Sabbath observers inherent in the statute is especially great—probably fatal—for these appellants. For they are not in trades catering exclusively to Jewish customers, such as were the kosher butchers in *Friedman v. New York*, 341 U. S. 907 (1951), whose competitors likewise closed on the Jewish Sabbath. These appellants sell children's clothing, shoes, draperies and slip covers, *in open and immediate competition with others who operate on Friday night and Saturday* (R. 14, 15). It is fair to assume that if the appellants are compelled to close also on Sunday, most of their Sunday customers will buy elsewhere on Friday night or Saturday.

Thus, one of the appellants will go out of business if the statute is enforced against him (R. 15) and if he chooses to hold to his faith, and the others will sustain serious economic loss over and above that which they voluntarily assumed by remaining faithful to their religious obligations. Counsel has no way of knowing what percentage of Sabbatarians situated like appellants would continue to suffer the economic loss and what percentage would instead quietly give up the faith that until now has been theirs. But the pressure, the compulsion, is there.

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[10] The requirement of ceasing activities of labor well before the actual time that the sun sets on Friday is an outgrowth of the Jewish doctrine of "building a fence around the Torah." Illustratively, the traditional Jew "adds from the non-holy to the holy" in connection with the sacred days of the calendar; i. e., work is suspended before the actual time that the Sabbath commences so as not to inadvertently encroach upon the sanctity of that day. In addition to the foregoing is the practical requirement of leaving business early so as to be able to prepare for synagogue attendance at sundown. See **The Babylonian Talmud, Seder Mo'ed, Rosh Hashanah** 9a (Soncino Press, 1938).

The economic loss is the instrument of compulsion, for the extent of the loss involved in having to give up what to them is the only non-sacred time of the week-end determines the degree of compulsion to abandon their faith. Faced with such economic loss or ruin, how many will persevere? *How many will begin to operate on what once was their sacred Sabbath?*

The problem must also be considered from the point of view of the organized Orthodox Jewish faith or of the other Sabbatarian faiths. A religious group has a right to "flourish according to the zeal of its adherents and the appeal of its dogma . . . The government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 342 U. S. 313, 314 (1952). This is at the essence of the religious freedom in our land—free competition between sects. The majority of sects observe Sunday; others, in direct competition with them for adherents, observe Saturday. More important to the instant case, Orthodox Judaism is in a highly competitive, albeit friendly, struggle for adherents with other branches of the Jewish faith[11] to whom this form of Sabbath observance is not so central. Even assuming that some proponents of the legislation in question were not attempting to protect Christianity in pressing for Sunday closings, the end result is the same—the competition is no longer free or fair. When only Sabbatarians are compelled to observe a *separate* secular day of rest, are the Sabbatarian faiths being permitted to flourish in accordance with the zeal of their adherents and the appeal of their dogma? Quite clearly the statute will seriously hamper Orthodox Judaism in its efforts to win new adherents and maintain old ones.

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[11] In 1948 it was said that, "No Figures exist as to the number of . . . individuals in the United States belonging to each of the four principal groups of Jewry, i. e. Orthodoxy, Reform, Conservative Judaism, and Reconstructionism." **Universal Jew. Encyc.**, Vol. 6, p. 246 (N. Y. 1948). But see **Mead, Handbook of Denominations**, Reform Judaism, p. 122 (Abingdon Pr., 1956) (Reform Judaism claims one million adherents as against two million each for Orthodox and Conservative Judaism).

But it is argued that the statute does not compel a Jew to work on the Sabbath but merely forbids him from working on Sunday. Only statutes which *directly* interfere with religion, it is said, are proscribed by our Constitution.

Concerning religious freedom, Justice Murphy said, "Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches." *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U. S. 624, 645 (1943). The distinction appellees seek to make between direct and consequential limitations on religious freedom has neither the clarity nor the unsophistication of a lasting Constitutional principle.

Ultimately, a statute's consonance with religious freedom can be measured only one way: By the degree of voluntarism, of freedom, in religious choice before and after the statute. Does this statute make it likely that some Sabbatarian businessmen will abandon their Sabbath observance and thus their faith?

In *Follett v. Town of McCormick*, 321 U. S. 573 (1944), this Court struck down an ordinance requiring a $15.00 per annum license fee of agents selling books, as applied to a Jehovah's Witness. In that case, the community imposed a tax *upon all businesses and professions* and, once paid, *there was absolutely no discretion in any governmental agency or personnel to withhold the license.* Thus, there was no attempt to single out any religious group, nor did the legislation leave open the door of administrative abuse.

Which of the two statutes, the *Follett* case statute or the instant one, more effectively limits religious choice or voluntarism? Indeed, ordinances like those in the *Follett* case, *supra*, are struck down not because they tend to compel anyone to give up his faith—they clearly do not—but because even though a $15.00 tax may contain no such compulsion, a $1,000.00 tax does, and the difference is only in degree. But this is not a statute which contains the seed of future possible compulsion; rather it will effect an immediate compulsion. The choice of going out of business or

giving up their faith will face Sabbatarian business men as soon as enforcement of the new law begins.

Thus the competitive disadvantage worked by the statute demands of them a decision both ends of which are inconsistent with freedom. And in broader terms, the rules of fair competition for all faiths within Pennsylvania's boundaries will be maintained, *except for those few numerically limited groups which still insist on Sabbath rather than Sunday observance*, sixteen hundred years of social and legal pressure to the contrary notwithstanding.[12] But to small religious minorities such as Orthodox Judaism "'. . . befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." Justice Murphy, dissenting, in *Prince v. Massachusetts*, 321 U. S. 158, 175, 176 (1944).

3. *The Pennsylvania Act of August 10, 1959, because it restricts appellants' religious liberty, may not be enforced against them unless it be established that their Sunday operations constitute a clear and present danger to society. Whether or not the statute be deemed an infringement of religious freedom, it must be judged by a more exacting standard than are other types of legislation.*

a. THE LEGISLATION RESTRICTS A FIRST AMENDMENT FREEDOM AND, THEREFORE, MUST BE JUDGED BY THE "CLEAR AND PRESENT DANGER" STANDARD.

Legislation the economic effect of which will so clearly be an instrument of religious disaffiliation, must be judged

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[12] The first Sunday law was promulgated by Emperor Constantine in 321 A. D. in conjunction with his establishment of Christianity as a means of unifying his complex empire. **Cross, The Oxford Dictionary of the Christian Church**, pp. 334, 335 (Oxford Univ. Pr., 1957); **Encyc. Brit.**, Vol. 21, **Sunday**, p. 565 (1950). See **Johnson** and **Yost, Separation of Church and State in the United States**, pp. 219, 220 (Univ. of Minn. Press, 1948).

by strict constitutional standards, because such statutes "in their operation diminish the effective exercise" of the right of religious freedom. *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940).

The usual presumption of constitutionality must be balanced by "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U. S. 516, 530 (1945); *Marsh v. Alabama*, 326 U. S. 501, 509 (1946); *Prince v. Massachusetts*, 321 U. S. 158, 164 (1944). "Any attempt to restrict these liberties must be justified by clear public interest, threatened, not doubtfully or remotely, but by clear and present danger." *Thomas v. Collins, supra*; See also *Schenck v. United States*, 249 U. S. 47, 52 (1919). Moreover, it must be established with equal clarity that the particular restrictions imposed upon the right guaranteed by the First Amendment is necessary to meet the danger. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins, supra*. "Freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639 (1943).

b. THE STATUTE RESTRICTS THE LIBERTY OF A SMALL RELIGIOUS MINORITY, UNABLE TO PROTECT ITS INTERESTS THROUGH THE NORMAL POLITICAL PROCESSES, AND, THEREFORE, MUST RECEIVE MORE EXACTING JUDICIAL SCRUTINY.

It is important to note the other, independent reason why this particular legislation is not attended by the usual presumption of constitutionality and must be scrutinized with especial care by this Court.

Justice Stone repeatedly stressed the necessity of especially careful judicial scrutiny of legislation passed under

circumstances throwing doubt upon the reliability of normal political processes. In *United States v. Carolene Products Co.*, 304 U. S. 144 (1938), he enunciated the "rational basis" standard of constitutionality and then qualified it (footnote 4, p. 152) by saying:

> "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. * * * *Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U. S. 510 . . ., or national, Meyer v. Nebraska, 262 U. S. 390, . . .; Bartels v. Iowa, 262 U. S. 404 . . .; Farrington v. Tokushige, 273 U. S. 284 . . ., or racial minorities. Nixon v. Herndon, supra; Nixon v. Condon, supra: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428, 4 L. Ed. 579; South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734, decided February 14, 1938, note 2, and cases cited.*" (Emphasis supplied.)

It will be noted that the "more exacting judicial scrutiny" here referred to has no necessary reference to First Amendment freedom cases. Those cases, and the different standard applicable to them, are also discussed by Justice Stone in the same footnote. And see *South Carolina State Highway Dept., et al. v. Barnwell Bros., Inc., et al.*, 303 U. S. 177, 184, footnote 2 (1938).

And in *Minersville School District v. Gobitis*, 310 U. S.

586, 605, 606 (1940) (the first flag-salute case) Justice Stone said in his dissent:

> "... I am not persuaded that we should restrain from passing upon the legislative judgment as long as the remedial channels of the democratic process remain open and unobstructed. This seems to me no more than the surrender of the Constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes. * * * And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities, although no political process was affected * * *. Here we have such a small minority entertaining in good faith the religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern * * *."

The appellants here are members of a class—Orthodox Jewish retailers—which is small in number. If they, together with Christian Sabbatarians, amounted to really substantial numbers,[13] the normal political processes might indeed protect them—their accumulated weight could make itself felt, and such legislation might well not pass. And if a day of rest could not, therefore, be obtained by passage of a Sunday closing law such as this one, and were still thought to be essential, the legislature would find another way of attacking the problems presumably existing by

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[13] There are 305,086 members of the Seventh Day Adventist Church in Continental United States, and 5,975 members of the Seventh Day Baptist Church. **World Almanac of 1960** (N. Y. World-Tel. and The Sun). See also note 11, supra.

selecting a day not prejudicial to *either* Sabbath observers or Sunday observers, or by legislating *both* days as days of rest, or by requiring businesses to close *on one day or the other*. By this last alternative, for example, no one would be prejudiced and everyone would have adequate rest and time to withdraw from the hurly-burly of wordly cares. It is true that, under this alternative, if there were very substantial numbers of Sabbatarians there would still be lacking something which appellees insist is important—the aura of spirituality hovering over an entire community at rest, about which more will be said later. But this is the price we would have to pay for living in a pluralistic society. *There isn't any real question but that if half our citizens were Sabbatarians, the legislature would be prepared to pay that price, and we would have no such closing law before the Court today.*

The difference then, is in numbers—Sabbath observers are few enough to be at the mercy of an overwhelming majority, acting through its legislature. And this is exactly why such legislation must receive the special attention of the courts.

4. *There exists no justification for enforcing the Pennsylvania Amendatory Act against appellants, whose continuing Sunday operations present society with no dangers, immediate or remote.*

Neither Sabbath observance in the traditional way nor Sunday business by these Orthodox Jews confronts society with any dangers, be they immediate and grave, or remote and slight.

a. THE NEED FOR REST.

Society has a legitimate interest in limiting the number of hours employees work, or the number of consecutive

days. There are any number of ways—legitimate ways—of accomplishing such a result, and in the past the legislature of Pennsylvania has done so without finding it necessary to select a specific day of rest.[14] At one time the Pennsylvania Legislature *did* pass a true, general "day of rest" law. In fact, it was a "day and one-half of rest" law. The Act of July 2, 1937, P. L. 2766, 43 Purd. Pa. Stat. Ann. §§921-931, provided, inter alia: ". . . no employer shall employ any person for . . . more than 5½ days in any period of seven consecutive days." While this Act was later pronounced unconstitutional (because a different portion of the Act, specifically declared to be non-severable, was held to be an unlawful delegation of legislative power), it clearly demonstrates that when the Pennsylvania Legislature was truly concerned with seeing that all persons received a weekly respite from work, it knew how to accomplish that result.

Admitting, then, the right of a state legislature to limit the number of consecutive days a man may work,[15] it does not follow that this legislation is valid. "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at *or in their operation diminish* the effective exercise of rights

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[14] See, e. g., Act of July 25, 1913, P. L. 1024, §3, as amended, 43 **Purd. Pa. Stat. Ann.** §103(a) (Women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended, 43 **Purd. Pa. Stat. Ann.** §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, §1, 43 **Purd. Pa. Stat. Ann.** §361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, §1, 43 **Purd. Pa. Stat. Ann.** §481 (employees of motion picture theatres must be given one day of rest per week). Many states (Arizona, California, Oregon, Wisconsin and Wyoming) have one-day-in-seven rest laws (See **Sunday Laws**, 25 S. Calif. L. Rev. 131, 134).

[15] It should be noted, however, that the Pennsylvania statutes referred to in the text and in the preceding footnote deal with employees only, a class perhaps much more in need of legislative protection than are entrepreneurs.

so necessary to the maintenance of democratic institutions." (Emphasis supplied.) *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940).

b. Ease of enforcement.

It may be said that a uniform day makes enforcement easier. But mere ease of enforcement cannot be the rationale sustaining a law which will result in religious infringement. Judge Alexander, of the Common Pleas Court of Philadelphia, has correctly pointed up the fact that ". . . such (one-day-in-seven) laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday laws is common knowledge . . . Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it. See, e. g. *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949)." *Comm. v. Cavelerro*, (published in The Legal Intelligencer, Philadelphia, June 22, 1960).

c. The need for regular periods of community repose.

Another rationale sometimes advanced to sustain Sunday closing laws is that there is a need for regular periods of community repose. The argument is that on one day a week our highly competitive, commercial society should lay down its arms and call a halt to the economic warfare and strains inherent in our way of life.

The question that immediately comes to mind is whether the alleged need for an entire community at rest is so imperative that Sunday operations by a small number of Orthodox Jews and other Sabbatarians presents our society with the kind of "clear and present" danger this Court has required in the past to sustain legislation effecting religious

freedom. The question almost answers itself. Indeed, it is probably because of the commercial inconsequence of such groups, and the desire to deal fairly with *all* citizens, that such a large number of states have Sunday closing laws with exceptions for those who out of religious conviction rest on another day.[16]

An examination of other legislation[17] held to be valid by this Court makes for a striking comparison between those practices which do, and those which do not, present society with "clear and present dangers". For example, to many Mormons, accepted doctrine required male members to practice polygamy. This duty was enjoined by different books which those Mormons believed to be of divine origin, among others, the Holy Bible, and they believed also that polygamy was required by the direct request of Almighty

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[16] **Mich. Stat.**, Vol. 13, §18.855; **Conn. Gen. Stat.**, §8609 (1949); **Ind. Stat. Ann.**, Ch. 43, §10-4301 (Burns, 1933); **Iowa Code Ann.**, Ch. 729, §1; **Ill., Smith-Hurd Ann. Stat.**, Ch. 38, §549; **Ohio Gen. Code Ann.**, §13045 (Page's); **Kentucky Stat.**, 436.160 (1903); **Okla. Stat.**, tit. 21, §909 (1951); **Maine Laws**, Ch. 121, §360; **Va. Code**, §18330 (1950); **W. Va. Code Ann.**, §6073 (1943); **Wis. Stat.**, §351.52.

[17] Blue Law legislation has never come before this Court, for full argument, in any case involving Sabbatarians. A somewhat analogous problem beset James Madison, as President. He said (**Writings of James Madison**, Vol. 3, pp. 274, 275 [J. B. Lippincott & Co., 1865]):

> "There has been another deviation from the strict principle in the Executive proclamations of fasts and festivals, so far, at least, as they have spoken the language of **injunction**, or have lost sight of the equality of **all** religious sects in the eye of the Constitution. Whilst I was honored with the Executive trust, I found it necessary on more than one occasion to follow the example of predecessors. But I was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or, rather, mere **designations** of a day on which all who thought proper might **unite**, in consecrating it to religious purposes, according to their own faith and forms. In this sense, I presume, you reserve to the Government a right to **appoint** particular days for religious worship. I know not what may be the way of thinking on this subject in Louisiana. I should suppose the Catholic portion of the people, at least, as a small and even unpopular sect in the U. States, would rally, as they did in Virginia when religious liberty was a Legislative topic, to its broadest principle."

God, in a revelation to Joseph Smith, their founder and prophet. This Court, not doubting the bona fides of that belief, nevertheless sustained a conviction for bigamy. But the danger in permitting the practice to continue was both clear and present. The Court said, at pp. 165, 166, that:

> ". . . according as monogamous or polygamous marriages are allowed, do we find the principles in which the Government of the People to a greater or less extent rests. * * * (P)olygamy leads to the patriarchal principle, and which, when applied to large communities fetters the people in stationary despotism, while the principle cannot long exist in connection with monogamy."
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> *Reynolds v. United States*, 98 U. S. 145 (1878).

Indeed, in *Cleveland, et al. v. United States*, 329 U. S. 14 (1946), this Court considered the practice of polygamy to be "a return to barbarism". At 329 U. S. 19, the point was made that:

> "The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community."

In *Davis v. Beason*, 133 U. S. 333 (1890), the fallacy of granting absolute religious freedom to such sects was exposed when the Court said at 133 U. S. 343:

> "There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passion of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kind ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious

> beliefs, their supporters could be protected in their exercise by the Constitution of the United States."

And see *Murphy v. Ramsey*, 114 U. S. 15 (1885).

In *Jacobson v. Commonwealth of Massachusetts*, 197 U. S. 11 (1905), prosecution followed the refusal and neglect to comply with the statutory requirement of vaccination against smallpox. While Jacobson did not raise religious infringement as a defense, he argued that the statute interfered with his liberty. This Court held that it was within the police power of local government to protect its citizens against contagious diseases. The result could hardly have been otherwise even if a religious scruple had been involved. An entire community can be endangered by the refusal of persons to permit immunization against contagious diseases and the case is a perfect example of a danger both clear and present—of a clash between the desperate needs of a community and the convictions of a man.

Other examples quickly come to mind. In the words of this Court (*Reynolds v. United States, supra*, at 98 U. S. 166):

> "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government in which he lived could not interfere to prevent the sacrifice? Or if a wife religiously believed in burning herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"

A closer case is presented in *Prince v. Massachusetts*, 321 U. S. 158 (1944). The religious practice involved was the distribution of Watch Tower magazines on the streets by young children, members of the Jehovah's Witnesses sect, in conformity with the scripture, "A little child

shall lead them." The laws of Massachusetts forbade girls under the age of 18 to sell magazines or periodicals or to engage in any other trade on the street. The importance of laws protecting children from being forced by their custodians to labor cannot be gainsaid and the case presented a difficult question of balancing the rights of the custodian of the child against the interest of society in protecting children. This Court, making it clear that if an adult rather than a child were involved, the result might well be different,[18] held that the statute was constitutional as applied to a child, Justice Murphy dissenting.

But we are not, in the instant case, dealing with "a return to barbarism" which "is a notorious example of promiscuity", as this Court described polygamy. We are not dealing with a refusal to become immunized against a highly contagious disease. We are dealing neither with attempts at human sacrifices nor with the religious compulsions of those women who burn themselves upon the funeral pile of their dead husbands. Nor are we dealing with child labor, out of religious conviction.

We are dealing with an institution—the Sabbath—as ancient as Judaism, and which Orthodox Jews believe to be at the core of their religion which is so much a part of Western civilization. It is an institution out of which grew Sunday observance among Christians as well as the very statute which Pennsylvania enacted in 1959 and which is the subject matter of this suit. We are dealing with the right of five traditional Jews profitably to operate modest and orderly businesses *and* to continue in the faith of their fathers, without having to make a state-imposed choice between the two.

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[18] Justice Rutledge said, at 321 U. S. 170:

"We think that with reference to the public proclaiming of religion, upon the streets and in other similar places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms . . ."

Thus, the "clear and present dangers" which have justified limitations on religious freedom in the past are entirely absent in the circumstances of the case at bar.

Finally, it must be asked whether an entire community at rest is such a socially desirable result that it may constitutionally be achieved at the expense of cultural diversity. Appellants' counsel are not referring to the emerging ways of life of "suburbanites", ways cutting clear across ethnic, religious and class lines; or the undesirability of stopping by legal compulsion such ways of life in the making,[19] of which the habit of "whole family" shopping on Sunday for family purchases at newly built, massive shopping centers and discount houses is but one example. Such considerations are not directly relevant to this particular case, for appellants are not and do not want to be part of that larger struggle. What has caused them and American Orthodox Jews for generations before them, to live a lifetime of "business as usual" Sundays has nothing to do with these new cultural trends of mid-twentieth century. Sunday business is an old business with them, a way of life, a cultural manifestation of their efforts to support their families without sacrificing sacred beliefs. Sunday work in their week-day trade is not their religious duty, but it is a way of life that developed because of their religion. "The essential characteristic of these (First Amendment) liberties is that under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and

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[19] To freeze by law a rapidly changing cultural pattern not heading in dangerous directions is unwise if not unconstitutional. The thought was expressed by contemporary philosopher Horace Kallen (**Cultural Pluralism and the American Idea**, University of Pennsylvania Press, 1956), when he said (p. 55):

> "... whatever stays truly always and everywhere the same stays null and dead. What exists and lives, struggles to go on doing so, and its struggle is its change. A living culture is a changing culture ..."

of many creeds." *Cantwell, et al. v. Connecticut*, 310 U. S. 296, 310 (1940). Can the "type of life" thereby developed by Orthodox Jews, harming no one, be outlawed by the Commonwealth of Pennsylvania?

Religious and ethnic differences have become obliterated in this vast land with amazing rapidity (to the great satisfaction of some and the consternation of others) *without* the aid of legal compulsion. The fondest hopes of some historians and philosophers of forty years ago,[20] that the democratic atmosphere on these shores would permit of the fullest flowering of many diverse ethnic cultures, have been shattered[21] with the mobility of our people and fluidity of social change—without the force that is law. For better or for worse, our people, our religions and our cultures are becoming in more and more ways indistinguishable.[22] Those few who wish to retain their distinctive way of life should be permitted to try without legal hindrance, and to try to influence others, including their children and later generations that their ways are best.

There are circumstances when not only religious pluralism, but cultural differences, too, come under the protective wings of the Constitution. No other rationale suggests itself for the unanimous opinions of this Court in *Meyer v. State of Nebraska*, 262 U. S. 390 (1923), in which a statute which prohibited the teaching of a foreign language to students who had not completed eight grades, was declared unconstitutional; and in *Pierce v. Society of Sisters*, 268

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[20] See, for example, **Horace M. Kallen, Culture and Democracy in the United States: Studies in the Group Psychology of the American Peoples** (Boni and Liveright, 1924), particularly pp. 115, 118-121.

[21] Compare the hopes of Kallen, **ibid.**, with the facts actually emerging, as described by historian **Oscar Handlin, The American People in the Twentieth Century**, Ch. VIII, p. 186, et seq. (Harv. Univ. Press, 1954).

[22] For a study of the impact of the majority culture on several small, insular Jewish communities, see **Ben Kaplan, The Eternal Stranger: A Sociological Study of Jewish Life in the Small Community** (1957).

U. S. 510 (1925), in which it was held that a State could not compel all children to go to *public* school. Justice McReynolds said, at 268 U. S. 535, "The fundamental theory of liberty upon which all government in this Union reposes excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." And see *Farrington, et al. v. Tokushige*, 273 U. S. 284 (1927); *Bartels v. State of Iowa*, 262 U. S. 404 (1923). These are some of the cases referred to by Justice Stone when he stated that special scrutiny must be exercised in reviewing statutes directed at particular religious, racial or national minorities, or affecting discrete and insular minorities. They have one common bond—they are attempts at cultural unification. "Fundamentally, it (cultural unification) would require the complete nationalization of education, the abolition of every form of parochial and private school, the abolition of instruction in other tongues than English and the concentration of the teaching of history and literature upon the English tradition. The other institutions of society would require treatment analogous to that administered by Germany to her European acquisitions." KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES, p. 119 (Boni and Liveright, 1924). Most of these have been attempted. Consistently such attempts have been struck down by this Court.

Analogously, in *West Virginia State Board of Education, et al. v. Barnette, et al.*, 319 U. S. 624 (1943), a rationale for the compulsory flag salute was that it was needed to foster national unity. In an opinion *not* grounded on the principle of religious freedom, Justice Jackson said, at 319 U. S. 640:

> "Lastly, and this is the very heart of the Gobitis opinion, it reasons that 'National unity is the basis of National security', that the authorities have 'the right to select appropriate means for its attainment', and hence reaches the conclusion that such compulsory measures toward 'National unity' are constitutional. * * * *National unity as an end which officials may*

foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." (Emphasis supplied.)

And if statutory compulsion cannot be used to attain unity in the name of national security, it surely cannot be the means of attaining unity for the sake of community repose and spirituality.

Justice Stone, in *Minersville*, *supra*, at 310 U. S. 606, said of the flag-salute problem:

> "With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."

In the same vein, there would be no momentous problem were a legislature to attempt to adjust its "rest" statute so as not to discriminate against some of its citizens. The Pennsylvania legislature did not even try.

B. The Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, violates the proscription against the establishment of religion contained in the First and Fourteenth Amendments to the United States Constitution.

Concerning the Massachusetts blue law statute, also before this Court, Judge Magruder said:

> "What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious ob-

servances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group."

Crown Kosher Super Market of Mass., Inc., et al. v. Gallagher, 176 F. Supp. 466 (D. Mass. 1959). Pennsylvania has done the same thing.

This Court in *Everson v. Board of Education*, 330 U. S. 1, 15-16 (1947), has held that the "establishment of religion" clause of the First Amendment means at least this:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'. *Reynolds v. United States* [98 U. S. 145 (1878)], at 164."

At page 18 of the same decision this Court added that "State power is no more to be used so as to handicap religions than it is to favor them". See also *McCollum v. Board of Education*, 333 U. S. 203, 210-211 (1948).

This Pennsylvania Amendatory Act is intended to and does in fact protect certain Christian sects and prefer them over other faiths and other sects of Christianity. That this

is the character of the law becomes clear when it is seen as one of a whole complex of Sunday laws and viewed in the light of the long history of judicial interpretation of that legislation.

1. *History of Pennsylvania Sunday Blue Laws.*

The statute of August 10, 1959, P. L. 660, which is here in issue, cannot be viewed as an isolated act. It is merely another law in a whole series of Pennsylvania Acts beginning in early colonial days.

The original Pennsylvania blue law of 1682, *Duke of Yorke's Book of Laws*, 1676, 1682, pages 107, 108, provided, inter alia, as follows:

> "WHEREAS, the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore, government in itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governour and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.
>
> "BE IT THEREFORE ENACTED BY WILLIAM PENN, PROPRIETARY AND GOVERNOUR, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same, That these following Chapters and Paragraphs shall be the

Laws of Pennsylvania and the territories thereof. Chap. 1. Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind. . . .

"BE IT ENACTED BY THE AUTHORITY AFORESAID, That . . . to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That, according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from their usual and common toil and labour, That whether Masters, Parents, Children, or Servants, they may the better dispose of themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best sute their respective persuasions."

The Act of April 22, 1794, section 1, 3 *Smith's Laws*, page 177, provided, inter alia:

"That from and after the first day of August next, if any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practice any unlawful game, and be convicted thereof, every such person, so offending shall, for every such offence, forfeit and pay four dollars, to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum, or goods and chattels cannot be found, whereof to levy the same by distress, he or she shall suffer six days imprisonment in the house of correction of the proper county. PROVIDED ALWAYS, That nothing herein contained

shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment, for the use of sojourners, travellers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families, on the Lord's Day, commonly called Sunday, nor to the delivery of milk, or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon, of the same day."

This law survived and became a part of the Criminal Code of 1939 (Act of June 24, 1939, P. L. 872, Sec. 699.4, 18 Purd. Pa. Stat. Ann. §4699.4). It is still, with certain amendments, the law today.

It is interesting to note that the specific exceptions to the foregoing section do not apply between the hours of 9:00 A.M. and 5:00 P.M., obviously for the purpose of influencing church attendance. Furthermore, the following section of the Act of 1794, section 2, made it a criminal act to "profanely curse or swear by the name of God, Christ Jesus or the Holy Ghost". At varying times it became expedient to riddle the basic law with special exceptions, but in each case there was a built-in protective feature for Christianity. Baseball, football, polo and tennis were permitted in localities which voted for them, but not on Sunday *morning*. Act of Apr. 25, 1933, P. L. 74, §2, 4 Purd. Pa. Stat. Ann. §82; Act of June 22, 1935, P. L. 446, §2, 4 Purd. Pa. Stat. Ann. §152. Motion picture exhibitions (Act of July 2, 1935, P. L. 599, §2, 4 Purd. Pa. Stat. Ann. §60) and public concerts (Act of June 2, 1933, P. L. 1423, No. 308, §2, 4 Purd. Pa. Stat. Ann. §122) were permitted by local option statutes too, but with the same protection for church services.

Another enlightening historical note on the Act of 1794 is set forth in *Commonwealth v. Pedano*, 33 D. & C. 551, 553 (Pa. 1938), where it is stated that "The present act (of

1794) was enacted as a direct result of the yellow fever plague of 1793 which ran rampant in Philadelphia. The plague was regarded as 'a scourge upon a wicked people'. The Pennsylvania legislature hastened to legislate away the wickedness of the people by shackling the devil in his most prosperous day." See also *Sparhawk v. Union Passenger Railway Co.*, 54 Pa. 401, 413 (1897).

2. *Judicial Interpretation of Pennsylvania Blue Laws.*

The Supreme Court of Pennsylvania has from 1853 to date, acknowledged—indeed, insisted—that the Sunday blue laws were based upon the fact that Sunday is a day which occupies a special position in the Christian religion. In *Sparhawk v. Union Passenger Railway Co., supra*, the Court said, at 54 Pa. 423:

> "*Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere wordly employment, are exactly what the statute was passed to protect:* 10 Casey 398." (Emphasis supplied.)

In *Commonwealth v. Nesbit*, 34 Pa. 398 (1859), the Court said:

> "*Let us inquire why people are forbidden to carry on their worldly business on the Sabbath? Our brother Woodward has already shown, that it is in order that people may devote the day to rest, and to the worship of God.* . . .
>
> . . . . . .
>
> "*How, then is it possible for a Christian people to avoid protecting such a day and its institutions?* If

there are men who oppose them as superstitions, let them at least respect them as essential constituents of the people's life, which cannot possibly be laid aside at will. If strangers to our institutions dislike these particular ones, let them accord a reasonable respect to us, and indulgence to our customs, and they will soon be reconciled to both, and find other matters more needing their reforming efforts.

* * * * * * * *

"On the other hand, *a special purpose of the day is, that people may enjoy religious worship and instruction,* and hence, the functions of the preacher, the religious teacher, the sexton, the organist, and the singers, are not forbidden, even though these persons engage in these employments as a means of livelihood. Hence, also, the ordinary means of attending public worship are not forbidden, when used purely for this purpose. In this view of the case, it is the rightness and the exigencies of the purpose that justify the ordinary means of effectuating it. *Conducting and attending religious worship are among the very purposes for which the law protects the day,* and therefore all the means which common usage shows to be reasonably necessary for these purposes, are not forbidden" (pp. 405-408). (Emphasis supplied.)

In *Commonwealth, ex rel. v. American Baseball Club of Philadelphia,* 290 Pa. 136, 143 (1927), the *last* time the Commonwealth's highest court has spoken on the subject, the Act of 1794 was upheld on the ground that *"Christianity is part of the common law of Pennsylvania . . . Sunday is the holy day among Christians."*

There is not one decision of the Pennsylvania Supreme Court in the last century which places the Sunday Laws on any basis other than the support of Christianity by honoring its holy day, the Lord's Day, and encouraging Christian religious worship.

3. *Careful draftsmanship of the Pennsylvania Amendatory Act in question, so as to make it appear as purely civil legislation, does not cure its constitutional infirmities.*

As Justice Frankfurter said in *McCollum v. Board of Education*, 333 U. S. 203, 232 (1948):

> "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion'. * * * If nowhere else, in the relation between Church and State, 'good fences make good neighbors'."

Appellants submit that it would be difficult to conceive of a clearer case of governmental protection and preference of a particular religious faith than is exemplified by the entire complex of blue law legislation in Pennsylvania. Indeed, Judge Hastie stated in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944, 951 (E. D. Pa. 1959), that "[t]he historical religious connection is so clear in both state statutes [New York's and Pennsylvania's] as to be obvious and indisputable."

We have reached the point in our constitutional development where legislators know they cannot enact legislation which on its face protects one religion. This Court by its opinions in the field of religious freedom, and in its emphasis on the principle of separation of church and state, has outmoded assertions that Christianity is part of the

common law of any state.[23] Thus, the Pennsylvania blue law statutes of the past several years are phrased in purely civil terms and make no reference to a deity or to Christianity.[24] But basic constitutional principles cannot be evaded merely by a change in draftsmanship. Careful phraseology does not camouflage the fact that all the latter day rationalizations for blue law legislation—the need for rest, for uniformity of enforcement, for community repose—have been conceived to save legislation, the real and obvious and heretofore admitted purpose for which is the protection and preference of Christianity.

Almost seventeen hundred years ago Emperor Constantine promulgated the first Sunday blue law as part of his program of empire unification by means of the establishment of Christianity.[25] From that day until this, blue law legislation has been religious in origin and purpose. The underlying statute in Pennsylvania today prohibits worldly employment on the "Lord's day", and Pennsylvania Courts have consistently justified the statute on the grounds that it protects Christianity. Thus, blue law legislation in 321 A. D. was among the first progeny of the marriage of Church and State and was viewed in the same light during the entire ensuing sixteen centuries until today. Such legislation does not comport with the ideals of a people who have "staked the very existence" of their country on "the faith that complete separation between the state and religion is best for the state and best for religion". *McCollum v. Board of Education, supra*, at p. 232.

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[23] Thomas Jefferson explored the origin of the assertion that Christianity is part of the Common Law of England. In one of his many fascinating letters to John Adams he concluded that the assertion had no basis. **Cappon, The Adams-Jefferson Letters**, Vol. II, pp. 422, 423 (Chapel Hill, 1959).

[24] In addition to statute under consideration, see, for example, Amendatory Act of July 8, 1957, P. L. 565, §1, 18 **Purd. Pa. Stat. Ann.** §4699.9 (supp.).

[25] See note 12, **supra.**

C. The Pennsylvania Amendatory Act of August 10, 1959, P. L. 660, is arbitrarily selective in the commodities and businesses affected, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

This case has been placed on the summary calendar for oral argument together with three other cases, one of which involves the identical Pennsylvania Act (*Two Guys From Harrison-Allentown, Inc. v. McGinley*, October Term, 1960, No. 36). Appellants' counsel have stressed in this brief the effect of the Act on these Orthodox Jews and similarly situated Sabbatarians. The arbitrary selectivity of the Act is a point which will be covered in full in the *Two Guys* brief, and, therefore, counsel for appellants will not burden the Court with further argument which can add little to the arguments set forth therein.

VIII.

CONCLUSION.

For all of the foregoing reasons, enforcement of the legislation before this Court will violate the First and Fourteenth Amendments to the United States Constitution. Appellants pray this Court to reverse the Final Order of the Court below (R. 18, 19) dismissing their Amended Complaint and to remand the case for further proceedings.

Respectfully submitted,

THEODORE R. MANN,
MARVIN GARFINKEL,
STEPHEN B. NARIN,
Attorneys for Appellants.

NARIN, GARFINKEL and MANN,
Of Counsel.